IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 26/04/2004

Coram

The Hon'ble Mr. Justice S.SARDAR ZACKRIA HUSSAIN

Civil Revision Petition No.3891 of 1998

Rathinathammal ... Petitioner.

-Vs-

1.Muthusamy.
2.Kaliaperumal.
3.Kannan.
4.Rajagopal.
5.Chellaiah.
6.Murugan.
7.Rajendran.
8.Sathiya Seelan.
9.Balasubramanian.
10.Balakrishnan.
11.Muthukrishnan.
12.M.Meenambal.
(Since the respondents 2 to 12
are unnecessary parties, they
are given up in this revision
petition). ... Respondents.

Civil Revision Petition filed under Section 115 C.P.C. against the order and decretal order dated 9.10.1998 and made in I.A.No.259 of 199 8 in O.S.No.50 of 1988 on the file of the Sub Court, Pattukkottai.

!For petitioner : Mr.T.Ayyasamy.

^For 1st respondent : Mr.V.Raghavachari.

:O R D E R

The revision petitioner is the 11th defendant in the suit O.S.No.50 of 1988 on the file of the Sub Court, Pattukkottai. The 11th defendant filed I.A.No.259 of 1998 under Section 5 of the Limitation Act, to condone the delay of 545 days in filing the petition to set aside the ex parte decree dated 7.10.1991 in that suit. The petition after contest was dismissed as per order dated 9.10.1998. The 11 th defendant has challenged the said order in this revision.

2. In the affidavit filed in support of the petition I.A.No.259 of 1998, it is stated that the first respondent/plaintiff filed the suit for declaration in respect of the plaint 'A' and 'B' schedule properties and also for possession of the plaint 'B' schedule property. The suit was originally filed against the defendants 1 to 7 on 19.9.1987 and as per order dated 26.11.1990 made in I.A.No.654 of 1990 the defendants 8 to 12 were added. But the revision petitioner/11th defendant was not served with suit summons. The records were created as if the suit summons was served upon her and was set ex parte and ex parte decree was passed in the suit on 7.10.1991. She came to know about the ex parte decree only after receipt of notice on 26.11.1996 in Execution Petition filed by the plaintiff for delivery of the plaint 'B' schedule property. She entered appearance though her advocate Vaithyanathan of Pattukkottai to whom she requested to take step to set aside the ex parte decree. The said advocate only filed vakalath in execution petition, but not filed counter, because of which, delivery was ordered in the execution petition. She came to know about the same when the Court bailiff came to hand over possession. Since there was summer vacation, she could not file the petition immediately. On equiry she came to know that records have been created as if she received suit summons after signing on 17.1.1991, on which date she was not in the village and she did not sign in the suit summons as "Rethinambal"(buj;jpdk;ghs;). She used to sign only as "Rethinam"(buj;jpdk;). She does not know the witness who has signed as "Sundaram" in the summons, and no such person is residing in Kottaikulam street. The signature in the summons has been forged. In the circumstances, there have been delay of 545 days in filing the petition to set aside the ex parte decree dated 17.1 0.1991.

3. The petition was resisted in the counter filed by the first respondent/plaintiff, in which it is stated that notice was served to the revision petitioner/11th defendant and she remained ex parte after receiving the suit summons. The suit was decreed only after contest by other defendants. The suit was decreed for the relief of declaration in respect of 'A' and 'B' schedule properties and also possession in respect of 'B' schedule property. The execution petition for delivery of possession was filed in December, 1996. The revision petitioner/11th defendant after receiving notice in execution petition engaged advocate and since her counsel informed that no counter was filed, delivery was ordered on 23.2.1998. Since it was resisted delivery could not be effected then. Again on the petition filed for police help, etc., and to deliver in the presence of Village Administrative Officer, it was ordered and that time also delivery could not be effected stating that there have been house in the suit property. Again the petition was filed to deliver possession after removing the thatched house and by allowing the petition delivery was ordered. Now at that stage, the petition was filed to condone the delay of 545 days in filing the petition to set aside the ex parte decree. The other averments in the petition have been denied. Each day delay has not been satisfactorily explained. The petition was also resisted that since the suit was decreed after contest, the remedy available to the revision petitioner/11th defendant is only to prefer appeal in this Court.

4. The trial Court considering the materials available on record and considering the facts that the suit was contested by five defendants among 12 defendants and that it was decreed only after full trial and that the delay of 545 days in filing the petition to set aside the ex parte decree has not been satisfactorily explained and therefore, in that view, dismissed the petition. The order is challenged in this Civil Revision Petition.

5. Heard the learned counsel for the revision petitioner/11th defendant and the learned counsel for the first respondent/plaintiff.

6. The learned counsel for the revision petitioner/11th defendant contended that in the suit the summons was not served upon the revision petitioner/11th defendant because of which she could not contest the suit. The revision petitioner/11th defendant came to know about the ex parte decree only after receipt of the notice in the execution petition filed for delivery of plaint 'B' schedule property and therefore, there have been delay of 545 days in filing the petition to set aside the ex parte decree. It is also submitted by the learned counsel for the revision petitioner/11th defendant that because the counsel, who was engaged by the revision petitioner/11th defendant to resist the execution petition, did not properly contest the execution petition and not filed counter and as such delivery was ordered. Further the learned counsel also submitted that the said counsel also did not take steps to set aside the ex parte decree in the suit.

7. The learned counsel for the first respondent/plaintiff argued that the revision petitioner/11th defendant was served in the impleading petition I.A.No.465 of 1990 and she did not choose to contest the said petition. Further, the learned counsel submitted that she was also served with suit summons for the hearing on 31.1.1991 and as per the endorsement in the suit notes-paper, the 11th defendant was served with suit summons and since she did not appear, she was set ex parte. The suit was contested by the defendants 2, 6, 7, 9 and 12 by filing written statements and considering the evidence oral and documentary let in on both sides, the suit was decreed as prayed for with cost on 7.10.1991. Thereafter, the first respondent/plaintiff filed execution petition for delivery of possession in respect of the plaint 'B' schedule property in which also the 11th defendant admittedly entered appearance through her advocate and since no counter was filed, delivery was ordered and at that stage to protract the proceedings, the 11th defendant filed the petition I.A.No.259 of 1998 to condone the delay of 545 days in filing the petition to set aside the ex parte decree without showing sufficient reasons to condone the enormous delay. Since the 11th defendant was set ex parte as per the endorsement in the suit notes-paper that she was served with suit summons, which is now not available with records, such endorsement with regard to serving of the summons on the 11th defendant cannot be challenged. In this regard the learned counsel for the first respondent/ plaintiff has placed the following reliance:-

(1) John Carapiet Galstaun, Decree holder, Opposite Party, Appellant vs. - Syed Mahammad Hussain Choudhury, judgment-debtor, Petitioner, Respondent reported in Volume XXXVI The Calcutta Weekly Notes, page 242, in which the Calcutta High Court has held:-

"Where the return of the service of process issued under Order 21 rule 22 of the Civil Procedure Code shows that the process has been duly served, there is a presumption under Section 114 of the Evidence Act that the official act of serving the process was rightly carried out and it would rest with the person challenging the return to rebut the presumption."

(2) Sachitanandan Prasad vs. - Janak Prasad Gosain and others reported in A.I.R. 1958 Patna 577 (V 45 C 189), in which it is held by the Patna High Court:-

"The certificate in the order sheet of the Court in the proceedings for commutation of rent, showing service of notice on the landlord raises a presumption that the notice was validly and properly served upon him."

(3) Green View Radio Service vs. - Laxmibai Ramji and another reported in A.I.R. 1990 Supreme Court 2156, in which the Bombay High Court has held:-

"Where a notice of eviction is sent by registered acknowledgement due to the correct address and the acknowledgement is received back with recipients signature, there is presumption that the addressee has received the letter in due course of business."

8. It appears that the 11th defendant/the revision petitioner was served with notice in the impleading petition I.A.No.465 of 1990, but she remained ex parte. The impleading petition I.A.No.465 of 1990 was allowed on 13.11.1990, since no counter was filed by the proposed 1 2th defendant and the proposed defendants 9 to 11 remained ex parte. As per notes-paper, it appears, the defendants 9 to 12 newly added, entered appearance through advocate and took time to file written statement. Though the 11th defendant, the revision petitioner was served with suit summons for the hearing on 31.1.1991, as per the endorsement on that date by the clerk concerned pursuant to the report of the Nazir, she did not appear on that day and after actually perusing such summons served on the 11th defendant, she was set ex parte. It is futile to contend now that the 11th defendant was not served with suit summons. The presumption is to be drawn pursuant to the endorsement in the suit notes-paper on the basis of the junior bailiff (process server) report and perusing the suit summons that the 11th defendant was actually served with such suit summons for the hearing on 31.1.1991 in the suit. It appears that the 11th defendant has also seen the said suit summons, in that in the affidavit, it is stated by her that she did not sign in the said summons as Rethinambal, since she used to sign only as Rethinam, but still she did not take steps for comparison of her signature in the suit summons along with her admitted signatures and to obtain report of the Handwriting Expert.
9.
Only on receipt of the notice in the execution petition filed for delivery of the plaint 'B' schedule property, with a view to delay the proceedings further, the 11th defendant filed the petition, subject matter of this revision under Section 5 of the Limitation Act to condone the delay of 545 days in filing the petition to set aside the ex parte decree. Though it is stated that the counsel engaged by her to contest the execution petition was

instructed to take steps for setting aside the ex parte decree of the suit and the said counsel did not take steps and also not filed counter in the execution petition because of which delivery was ordered in the execution petition, she has not examined the said counsel.

10. As pointed out by the trial Court, though the 11th defendant came to know about the ex parte decree only on receipt of the notice in the execution petition, she engaged advocate and instructed to file necessary petition to set aside the ex parte decree and also to file counter in the execution petition, she could have pursued the matter as to whether such petition was filed to set aside the ex parte decree by the counsel, in that she is residing at Pattukkottai where his counsel is also residing. Though she was also fully aware of the said proceedings and also execution proceedings from the time she was impleaded in the suit since she has been residing near the house of the other defendants, who contested the suit and despite the said fact, the suit was decreed since she did not choose to contest the suit and allowed the suit to be decreed ex parte and uncontested by her and only at the time of delivery of the property, to delay the proceedings as much as possible she thought fit to file the petition seeking to condone the delay of 545 days in filing the petition to set aside the ex parte decree.

11. Admittedly, the 11th defendant received notice in execution proceedings on 26.11.1996 , but she filed the petition I.A.No.259 of 1998 to condone the delay of 545 days in filing the petition to set aside the ex parte decree only on 8.6.1998 stating that she was under the impression that her counsel could have taken steps to set aside the ex parte decree which is unbelievable as pointed out by the trial Court that she had to wait for about two years after entrusting the matter to the counsel. Therefore, considering all these facts, the trial Court has rightly dismissed the petition that no sufficient reason was shown by the 11th defendant to condone the delay of 545 days in filing the petition to set aside the ex parte decree. It appears the delivery of ' B' schedule property already was effected and possession was taken by the first respondent/plaintiff.

12. In the result, this Civil Revision Petition is dismissed with cost confirming the order dated 9.10.1998 made in I.A.No.259 of 1998 by the trial Court.

Index :Yes.
Internet:Yes.

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To

1) The Subordinate Judge,
Pattukkottai.

2) The Section Officer,
V.R. Section,
High Court,
Madras.